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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 997

LEE ART THEATRE, INC. *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

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LEE ART THEATRE, INC. *Petitioner*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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*To the Honorable the Chief Justice and Associate Justices of the United States:*

Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Appeals of the Commonwealth of Virginia entered in the above entitled case on the 10th day of October, 1967 (Appendix A and B).

## OPINIONS BELOW

There were no written opinions in the courts below.

## JURISDICTION

The judgments sought to be reviewed are final judgments of the Supreme Court of Appeals of the Commonwealth of Virginia dated and entered on the 10th day of October, 1967, affirming the convictions of the petitioner.

Jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

## QUESTIONS PRESENTED

I. Whether an affidavit executed for the issuance of a search warrant which recites as the material facts constituting probable cause only: "personal observations of the . . . motion picture. . . ." and a search warrant issued thereunder for "lewd and obscene" motion pictures is so general and conclusory as to offend the Fourth Amendment to the United States Constitution.

II. Whether the Fourth Amendment to the United States Constitution which specifies that probable cause must exist for the issuance of a search warrant means that a search warrant and the affidavit executed to obtain the warrant must contain a statement setting forth when the offense was committed as well as a recitation showing when the officer obtaining the warrant observed the offense.

III. Whether Title 18.1-227 of the Code of Virginia which defines obscenity offends the standards of obscenity set by this Court in that the Virginia statute does not protect from prosecution motion pictures which contain redeeming social value within the meaning of the First Amendment to the United States Constitution.

## STATUTE INVOLVED

Title 18.1-227 of the Code of Virginia.

§ 18.1-227. "Obscene" defined.—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose

an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representaton of such matters.

## STATEMENT OF FACTS

Petitioner was convicted by the Hustings Court of the City of Richmond for violation of Title 18.1-228 of the Code of Virginia which defines possessing and exhibiting lewd and obscene moton pictures.

In this prosecution, motion picture films were introduced into evidence over petitioner's objection. These films were seized from the petitioner by the police of the City of Richmond pursuant to a search warrant and affidavit for search warrant which were executed on March 31, 1966.

The affidavit stated that it was being issued in order to obtain a search warrant for "possessing, exhibiting and showing lewd and obscene motion pictures. . . ." The material facts constituting probable cause were stated as: "Personal observation of the above motion pictures and previews. Observation of the billboard in front of the theatre." (R. p. 363, Appendix C) The search warrant executed as a result of this affidavit authorized a search for "lewd and obscene motion pictures and other pornographic material." (Appendix D)

A motion to suppress the motion pictures seized under this warrant was made and denied. (R. p. 343-346; 376-377; 395-404; 410-413) Over petitioner's objections the officer seizing the films was permitted to introduce them into evidence and the films were then shown to the jury (R. p. 114; 117-118).

Petitioner also challenges the Virginia statute upon which the information charging him with exhibiting and possessing obscene motion pictures was based. Petitioner alleged that the statute failed to recite a constitutionally valid standard of obscenity in that that statute omitted

from its definition of obscenity works which have redeeming social value (R. p. 6-11). In fact, at the trial the petitioner produced evidence that the films did contain redeeming social value (R. p. 279-280).

The jury found petitioner guilty (R. p. 336-337) and the Court entered judgment in accordance with the verdict (R. p. 340).

On October 10, 1967, the Supreme Court of Appeals of Virginia refused to grant a Writ of Certiorari and thereby affirmed these convictions.

## REASONS FOR GRANTING THE WRIT

### I.

The affidavit utilized in this case recited only "personal observations of . . . motion picture and previews."

It is initially apparent that no facts are alleged in the affidavit to justify a search for "lewd and obscene" motion pictures. The affidavit made no effort to comply with the command of Title 19.1-83 of the Code of Virginia which prohibits the issuance of a search warrant where material facts constituting probable cause are not alleged (Title 19.1-85 of the Code of Virginia). That the words "lewd and obscene" are conclusory and not supported by material facts in self-evident. As the United States Supreme Court stated in *Stanford* v. *Texas*, 379 U.S. 476 (1965), in suppressing a similar search warrant: "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning and false to its history." The Fourth Amendment's standard for search warrants was set forth in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) ". . . The Magistrate must be informed of the underlying circumstances . . ." The Court further stated in suppressing the evidence gained under the *Aguilar* warrant "For all that appears, the source here merely suspected, believed or concluded . . ."

The instant warrant is no more discriminate than the ones condemned in *Stanford* and *Aguilar*.

## II.

Petitioner further alleges that the search warrant and affidavit for search warrant were wanting in another material respect. Neither document recited when affiant made his observations nor was there a statement as to when the alleged offense giving rise to the warrant occurred (Appendix C & D).

While this precise point may not have been presented to this Court, it is so well settled, that petitioner urges this failure alone destroys probable cause.

In *People* v. *Musk*, 383 N.W. 865 (Michigan 1925), an affidavit for search warrant which failed to allege time was held to be fatally defective by the Court which states: "It will be noticed that in the affidavit it was not stated when the intoxicated persons were seen, nor when persons drinking moonshine whisky on the premises did their drinking nor when the whisky was purchased . . ." Similarly in *Messer* v. *Commonwealth*, 350 S.W. 2d 486 (Kentucky 1961), the principle was stated that affidavits for a search warrant must disclose the time at which the observation was made. *Welchance* v. *State*, 114 S.W. 2d 731 (Tennessee 1938) held that the time requirement of a search warrant was held essential to the question of probable cause.

Finally on this point, not only are the courts unanimous that an allegation of time is essential, but as put by the text writers in 100 ALR 2d 528: ". . . this rule is apparently so well recognized that few cases contain a positive statement to this effect." It necessarily follows that allowing the introduction of the seized films into evidence under an invalid warrant was prejudicial error and repugnant to petitioner's rights under the Fourth Amendment to the United States Constitution.

## III.

Under the Virginia Code the word "obscene" is defined as: ". . . that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." (Title 18.1-227 of the Code of Virginia)

However, in *Roth* v. *United States*, 354 U.S. 476 (1957) the Supreme Court rejected a work only where it was utterly without redeeming social importance. The Virginia statute while purporting to define obscenity completely omits and therefore by inference includes constitutionally protected works that *Roth* would approve when redeeming social value is shown.

In *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) where a conviction of a manager of a motion picture theater was reversed, the obscenity test was stated as whether to the average person applying contemporary community standards the dominant theme of the material taken as the whole appeals to prurient interest. The Court went on to say that a work may not be denied its constitutional protection unless it is "utterly" without social importance.

The Virginia statute in failing to provide a protection for works containing redeeming social value is therefore repugnant to the First Amendment to the United States Constitution.

## CONCLUSION

It is respectfully submitted that the foregoing Petition for a Writ of Certiorari should be granted.

PLATO CACHERIS, ESQ.
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Alexandria, Virginia 22313
*Counsel for Petitioner*

APPENDIX "A"

*VIRGINIA:*

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 16th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 1), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition for writing said writ of error and supersedeas, and doth refuse the same and doth affirm the judgment of the said hustings court.

A Copy,

Teste:

H. J. Travers
Clerk

---

APPENDIX "B"

*VIRGINIA:*

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 16th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 2), having been maturely considered and a transcript of the

## APPENDIX "A"

*VIRGINIA:*

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 18th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 1), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

H. J. TURNER
*Clerk*

---

## APPENDIX "B"

*VIRGINIA:*

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 18th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 2), having been maturely considered and a transcript of the

record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

H. J. TURNER
*Clerk*

---

## APPENDIX "C"

DEFENDANTS' EXHIBIT #3

### AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia,
City of Richmond, to-wit:

Before me, ....., ....., a Justice of the Peace of the City aforesaid, this day appeared Charlie E. Phillips and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made. Possessing, exhibiting and showing lewd and obscene motion pictures, To-wit: "The Erotic Touch of Hot Skin" and previews of "Rent-A-Girl" motion picture.

(2) The material facts constituting probable cause for issuance of the warrant. Personal observation of the above mentioned motion picture and previews. Observation of the billboard inf ront of theatre.

(3) What is to be searched for under the warrant. Lewd and obscene motion pictures and other pornographic material that is kept in said theatre.

(4) The building to be searched. THE LEE ART THEATRE, 934 West Grace Street, Richmond, Virginia.

CHARLIE E. PHILLIPS
*Affiant*

Subscribed and sworn to before me this 21st day of March 1966.

M. C. LOWRY, III
*Justice of the Peace*

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## APPENDIX "D"

## SEARCH WARRANT

DEFENDANTS' EXHIBIT #1

Commonwealth of Virginia
City of Richmond

TO ANY POLICE OFFICER:

WHEREAS an affidavit has been filed with me pursuant to law and complaint made before me by Charlie E. Phillips that Lewd and Obscene Motion Picture and other Pornographic Material is being Possessed, Shown and Exhibited in the Lee Theater, 934 W. Grace Street, Richmond, Virginia, and it appearing that there is reasonable and probable cause for such belief:

These are therefore to authorize and require you, in the name of the Commonwealth of Virginia, to enter in the day or night time the premises described as follows: The Lee Theater, 934 W. Grace Street, Richmond, Virginia and there diligently search for the said goods and bring the same and the person or persons in whose possession the same are found, before Hustings Court of the said City to be disposed of or dealt with according to law.

And you are hereby further required to make your return of this warrant to Hustings Court of said City, showing all things done thereunder, with a particular statement of the things seized and the name of the person in whose possession they were found, if any, and if no person be found in possession of said article, your return shall so state, and you shall post a copy of this warrant on the door of the building or other place where said Lewd and Obscene Motion Picture and Other Pornographic Material are found, and if there be no such door, then in any conspicuous place upon the premises.

Given under my hand and seal, this 21st day of March 1966.

M. C. Lowry, III
*Justice of the Peace*

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No. 997

LEE ART THEATRE, INC.,
*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,
*Respondent.*

## REPLY BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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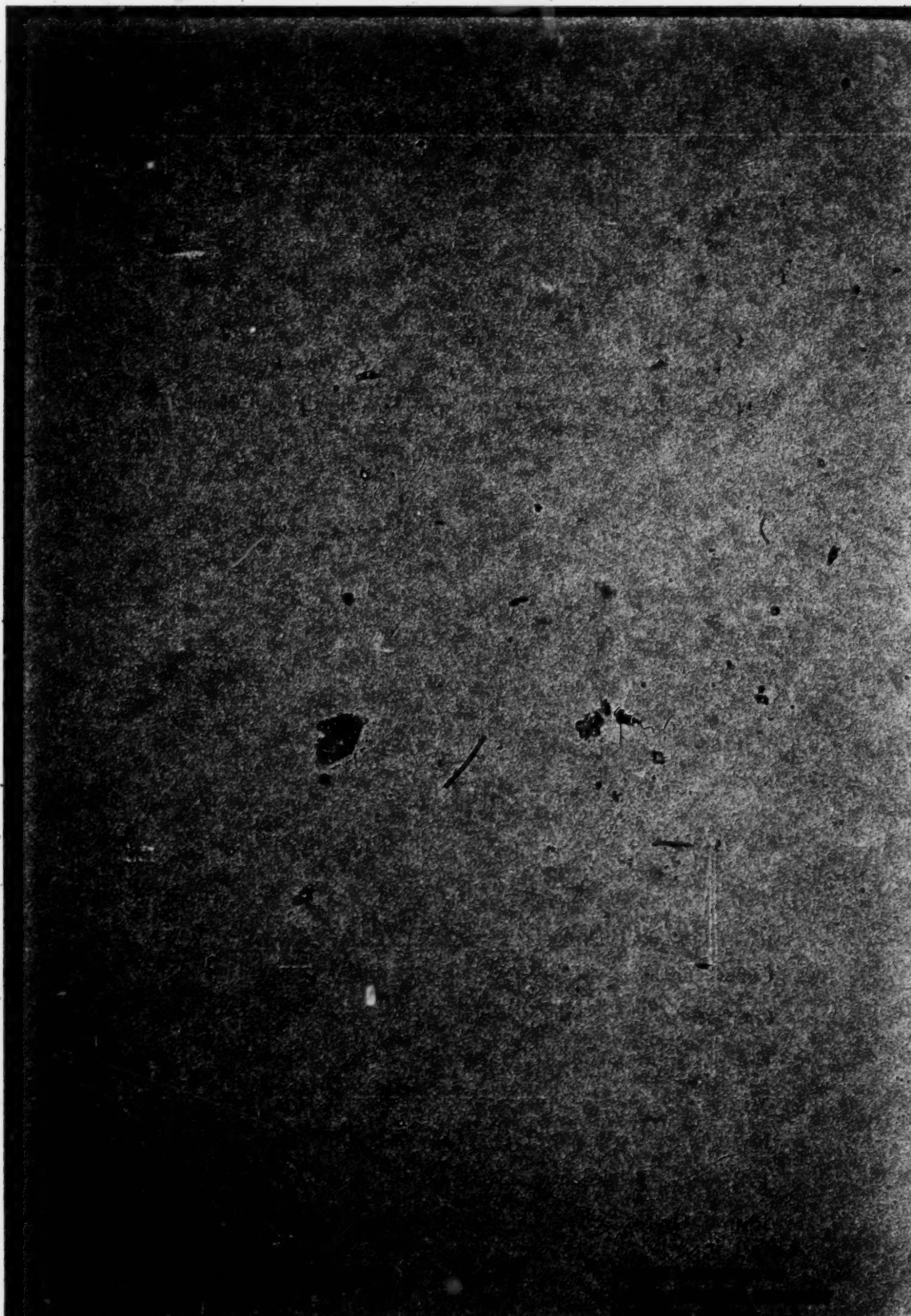

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*Respondent.*

## REPLY BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The respondent, the Commonwealth of Virginia, respectfully submits that the petition for a writ of certiorari to the judgment of the Supreme Court of Appeals of Virginia in the above entitled case entered on the 10th day of October 1967, should be denied.

The questions raised by the petitioner will be answered in the same order that the petitioner has them numbered and, for the sake of clarity, the parties will be referred to as they appeared in the trial court. Since this Court has

raised an issue not presented by the petitioner, it will be necessary to elaborate on the facts of the instant case in some detail. (See letter of March 5, 1968, from E. P. Cullinan, Deputy Clerk, to the Honorable Robert Y. Button.)

## STATEMENT OF FACTS

The prosecution involved in this case was initiated by the Richmond Bureau of Police on the 21st day of March, 1966, after the officers viewed the film, "Erotic Touch of Hot Skin," the previews of "Rent-A-Girl," and "fliers" at the Theatre, designated as Lee Art Theatre, Inc. The first mentioned film was personally observed by the police officers and, pursuant to their observation, a search warrant was obtained by the police. Pursuant to this search warrant, the film, the "Erotic Touch of Hot Skin," the previews of "Rent-A-Girl" and the movie, "Rent-A-Girl," were seized. The "D-Girls," which the officers had observed on previous occasions, was also seized at the Theatre. The search warrant only listed "Erotic Touch of Hot Skin" and the previews of "Rent-A-Girl," however, the officers had also observed the other movies, except the film entitled "Rent-A-Girl."

This case originated due to the kind of advertisement given by the Lee Art Theatre, Inc., to the motion pictures being shown at the said Theatre. These advertisements consisted of "fliers" on the front of the Theatre and also in the local newspapers. The "fliers" and advertisements in the papers displayed nude women with sexual organs blotted out, and also both male and female in suggestive positions.

The officers observed the movie, "Dirty Girls," on Saturday, and were preparing to seize this movie on the following Monday, but the Theatre changed pictures on that Monday. After this change of events, it was necessary for

the officers to observe the motion picture, "Erotic Touch of Hot Skin." After observing this motion picture and the previews of "Rent-A-Girl," they obtained a search warrant to gain admittance to the projection room of the Theatre. It can be noted by "Appendix C" in the defendant's brief that two of the movies seized were designated in the affidavit for the search warrant and search warrant. The probable cause consisted of personal observation by the officers of the subject movies so seized. After the officers were lawfully in the projection room under the search warrant, they did seize other movies which they had observed on prior occasions, except for "Rent-A-Girl."

Originally, the manager and assistant manager of the Theatre were charged under the applicable Virginia statute. They were offered by the Commonwealth's Attorney, with the Court's agreement, a trial within seven days after their arrest to determine if the motion pictures, "Erotic Touch of Hot Skin," and "Rent-A-Girl," were obscene or not. This was done so that the defendants could receive a speedy trial on the question of obscenity of the motion pictures and so that the business of the Theatre would not be unduly burdened, should it be determined that the motion pictures so seized were protected under the First Amendment to the United States Constitution. The defendants requested that a trial date be set off at some distant date and stated that they did not wish to have an immediate hearing on the question of whether or not the movies were obscene.

On May 19, 1966, the original defendant, Lunsford Lancelot Duke, filed in the United States District Court of the Eastern District of Virginia, Richmond Division, a petition for removal of the prosecution to the Federal Court. In reply to this, the Commonwealth made a motion

to remand. The Honorable John D. Butzner, the then District Judge, remanded the case to the State Court on May 26, 1966. The defendant then indicated his intention to appeal the District Judge's ruling to the United States Court of Appeals for the Fourth Circuit. This appeal was abandoned and, on September 16, 1966, an order was entered, dismissing the said appeal under Rule 23 of the United States Court of Appeals for the Fourth Circuit.

The cases then came back to the Hustings Court of the City of Richmond and, after conferences and negotiations by the then counsel for the Lee Art Theatre, Inc., and Lunsford Lancelot Duke, it was agreed that the manager and assistant manager would be dismissed from prosecution, that the Corporation, Lee Art Theatre, Inc., would be made a defendant instead and that the cases would subsequently be tried to determine wheher or not the motion pictures in question were obscene or not.

Pursuant to this agreement of counsel, the defendant Corporation was tried and all matters of fact and law were presented to a jury which was under proper instruction from the Court. The jury then returned a verdict of guilty and set the punishment and a fine of $500.00. In Virginia, the jury also sets the punishment for any one convicted of a crime.

Under the facts and law, the trial court found the jury verdict correct and, accordingly, entered judgment against the defendant Corporation. The defendant noted its appeal to the Supreme Court of Appeals of Virginia which, on the 10th day of October, 1967, refused a writ of error and supersedeas to the judgment of the Hustings Court of the City of Richmond. After this, the petitioner filed a petition for a writ of certiorari to the Supreme Court of the United States.

## QUESTIONS PRESENTED

### I.

**The Affidavit Set Out Enough Facts To Establish Probable Cause For The Issuance Of A Search Warrant.**

It would appear that no better probable cause could be established than the personal observation of a police officer who is making the affidavit. The affidavit was concise and set forth exactly what the officer was looking for by the names of the motion picture and previews. He also stated that his observation of the billboard in front of the Theatre assisted him in determining the motion pictures were obscene. That is to say, that this Theatre was "pandering" sex.

The Fourth Amendment provides that:

> "* * * No warrant shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched and the persons or things to be seized."

It is respectfully submitted that the affidavit and search warrant in this case complied with that mandate as the place to be searched and the things to be seized were adequately described in every particular.

### II.

**The Fourth Amendment To The Constitution Does Not Demand That The Affidavit And Search Warrant Should Have The Time That The Offense Occurred And When The Observations Were Made By The Officers.**

This question must be answered in the negative, as the Virginia law does not require that the time of the observations or offense be placed in the affidavit for a search warrant. The Virginia statute sets forth what the affidavit

must contain prior to issuance of a search warrant as follows:

> "Section 19.1-85. No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made. Such affidavit shall be certified by the officer who issues such warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued."

Nowhere in the statute does it say that the time must be put in the warrant. In *Ker* v. *California,* 374 U.S. 23, this Court held that there was no set rule that the states must follow in determining the reasonableness of the search, so long as the search was not prohibited by the Fourth Amendment to the Constitution. In *Ker,* the following is stated by the Court:

> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts

and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, *e.g., Spano* v. *New York,* 360 U.S. 315, 316 (1959); *Thomas* v. *Arizona,* 356 U.S. 390, 393 (1958); *Pierre* v. *Louisiana,* 306 U.S. 354, 358 (1939). While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.,* constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones* v. *United States,* 362 U.S. 257 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

## III.

### Title 18.1-227 Of The Code Of Virginia, 1950, As Amended Is A Proper Definition Of Obscenity.

It is respectfully submitted that the definition of obscenity as defined in the Virginia Code is derived from *Roth* v. *United States,* 354 U.S. 476 (1957). This definition states that the article must be considered as a whole and must have as its dominant theme or purpose an appeal to the prurient interest; that is, a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond the customary limits of candor in describing or representing such matter.

The instructions given the jury set out these points and also the question as to whether there was any redeeming social value in the movies. The jury found as a fact and beyond a reasonable doubt, that there was no redeeming social value in the movies. The instruction given to the jury as to the obscenity issue is as follows:

> "The Court instructs the jury that the test to determine obscenity is as follows: Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> The Court further instructs the jury that under this definition three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
>
> And the Court further instructs the jury that unless you believe from the evidence that the Commonwealth has established beyond a reasonable doubt that the

> motion picture involved in this case is obscene under the above definition, then the jury must find the defendant, Lee Art Theatre, Inc., not guilty."

As to the question of obscenity, the jury would be in a much better position to determine this question than would any other group or panel. The jury was composed of a cross-section of the community. Their minds were not biased and certainly they were, and are, protectors of the First Amendment freedom. Their objectivity would be fairer than that of lawyers and judges, as they should have the right to determine the moral values in the society in which they live and raise their children. This jury found beyond a reasonable doubt that the motion pictures were obscene and it is respectfully submitted that a jury verdict found on facts and proper law should not be disturbed by courts, unless clearly wrong.

The framers of the Constitution and the people of this nation, feeling and enjoying freedom, have, in the Constitution, protected the right of trial by jury. This right is guaranteed to both the defendant and to the government. The Seventh Amendment, which deals with civil cases, clearly states:

> "No fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law."

It is submitted that the defendant is now asking this Court to sit as a jury in the instant case. Trial by jury is a most sacred right and under our republican form of government give the people an opportunity to speak under law.

The defendant has not pointed out any error in the instructions and has not argued strongly that the motion pictures in question were not obscene. Anyone viewing the

motion pictures could not have come to the conclusion that they were not obscene. Obscene material is not protected by the First Amendment. *Roth* v. *U. S., supra.*

The defendant was pandering sex by the advertisements on the front of the Theatre. In *Ginzburg* v. *U.S.*, 383 U.S. 463, this Court stated:

> "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test."

The Court in *Ginzburg, supra,* further defines obscenity when it stated with approval the following:

> "Petitioners' own expert agreed, correctly we think, that '(i)f the object (of a work) is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic."

Clearly, the motion pictures in question violate and do violence to every rule of decency and morality known in this nation and are utterly without any redeeming social value. The Theatre and movies were selling sex for the sole purpose of profit to the exhibitor.

## IV.

### Marcus, Et Al. v. Search Warrant Of Property, 367 U.S. 717, Does Not Apply To The Instant Case.

The defendant has never raised this issue in any of his arguments, briefs, or negotiations in this case. The point was not raised in the Hustings Court of the City of Rich-

mond, the Supreme Court of Appeals of Virginia nor the brief for a petition for a writ of certiorari, but apparently the Court, on its own motion, raises the *Marcus* case. It seems to be well settled that if the question is not raised in the State Court, the Supreme Court of the United States will not take jurisdiction of the matter. *Cox* v. *Texas*, 26 S. Ct. 671; *McGoldrick* v. *Compagnie Generale Transallantique*, 60 S. Ct. 670; *Pennsylvania Railroad Company* v. *Illinois Brick Co.*, 56 S. Ct. 556; *Bothwell* v. *Buckbee-Mears Co.*, 48 S. Ct. 124, 275 S. Ct. 274.

However, it is respectfully submitted that the *Marcus* case is not even in point with the present case. The search involved in this case certainly was not a general search. The officers listed in the affidavit, the movies, and previews that were obscene, which they seized. The police officers' judgment as to the movies being obscene was affirmed by a committee of citizens a few days after the seizure. This group had not been sanctioned by the Court, but was called together by the Attorney for the Commonwealth to see if they felt the movies were obscene. Further, the jury which tried the case found the movies to be obscene.

The Court, in the first instance, expressed its desire to have the case heard immediately after the seizure to determine whether or not the films were obscene. The defendant was the cause of the delay in having the matter immediately adjudicated, not the Commonwealth. The prosecuting attorney insisted on an early date because he was aware of the rulings of this Court relative to obscene publications. There was no undue delay created or caused by the prosecution, in giving the defendant its day in Court.

In the *Marcus* case, it is stated that 180 of the publications seized under the search warrant were found not to be obscene, and the fact that only one-third of the publications so seized were finally condemned strengthens the conclusion

that discretion to seize allegedly obscene materials cannot be confined to law enforcement officials without greater safeguards. The finding in this case supported the police officer in his determination that the movies were obscene. There was a conviction on both motion pictures so seized in the instant case. If the Court is going to use the language in Marcus to show whether it is a general search or not in favor of the defendant, it would be only fair that the Court use the converse position in finding the subject matter obscene.

Furthermore, the Fourth Amendment to the United States Constitution only forbids unreasonable search and seizure. In this case, there has been no showing that the search and seizure was unreasonable, but to the contrary, very reasonable. The officers paid their way into the Theatre the first time, observing the motion pictures, and had a right to make an arrest at that particular time, but they went instead to get a search warrant. The officers were lawfully there and the movies which they seized were properly seized. The officers did not indiscriminately take any and all films on the premises, but only those of which they had personal knowledge.

It is respectfully submitted that this case is not in point with the facts in the instant prosecution.

## V.

### Request To Clarify Law

It is widely held that the law of obscenity is now in a state of confusion. Police, prosecutors and defense attorneys cannot positively determine whether or not a certain material is obscene. On one hand, the public is demanding a sense of morality and decency in the nation while, on the other hand, cases are being reversed on a technical ground or because

the material is believed to be protected under the guarantee of the First Amendment to the Constitution.

This leaves the nation in a state of confusion as to this important aspect of the law. A simple problem is made complex. Every one can recognize obscenity when they see it. If the law be that any and all publications and works are to be protected under the Constitution, then the Court should so state in plain and unequivocal language, thereby giving the states and their people the right to exercise their privilege under Article 5 of the Constitution. If the people of the nation are satisfied with the Court's ruling, then no more need be said, but if they are aggrieved, then certainly they would have a right and duty to amend the Constitution, outlawing obscenity.

Fair play requests and justice demands that the Court clear up, once and for all, the ambiguity in our law, in order that the citizens, police and prosecutors may know where they stand.

## CONCLUSION

It is obvious from casual observation that obscene material is infiltrating the moral fiber of the nation to such an extent as to strike at the very walls and foundation upon which this nation is built. Crime increases at the rate of almost nine times the growth of our population. The situation has become so acute that the Honorable J. Edgar Hoover, Director of the Bureau of Investigations, made the following statement:

> "Police officials who have discussed this critical problem with me unequivocally state that lewd and obscene material plays a motivating role in sexual violence. In case after case, the sex criminal has on his person or in his possession pornographic literature or pictures. Under these conditions, it is not surprising

to note that forcible rape in 1966 increased 10 percent over the 1965 total, a violation occurring every 21 minutes. Since 1960, forcible rape has increased 50 percent.

Obviously, all that is being done to combat the sale and traffic in obscene material in the Nation is not enough. Sound and workable laws are needed, and, where they do exist, they should be vigorously enforced. Since many courts seem to judge obscenity on the basis of the moral standards in the community, the public has a vital role in upgrading the level of community morality. When obscene material is discovered, it should be exposed and citizens should complain to proper authorities. When pornography is received in the mails, postal authorities should be advised. Citizens should come forward and cooperate in the prosecution of offenders.

Obscene material is indeed evil, but it is not a necessary evil. If the illicit profits in pornography were replaced with stiff punishments for the filth purveyors, this evil would be brought under control."

The facts of this case clearly and beyond a reasonable doubt show that the defendant corporation had a fair and impartial trial based on the law of the land and no person could ask for more. By obscenity not being protected either by the State or Federal Constitution, it is clear that the defendant is guilty of violating a valid criminal law of the Commonwealth of Virginia.

The question in the instant case is whether the judicial branch of government which has been charged with the responsibility of protecting the public morals will delegate this responsibility to irresponsible purveyors of hard core pornography. It is respectfully submitted that the esteemed judiciary of this country is not ready or willing to allow this to happen.

Obscenity plays such a major part and cause of crime and lawlessness found in our present-day society it should be suppressed.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

## LEE ART THEATRE, INC. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 997. Decided June 17, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted. Petitioner, operator of a motion picture theatre in Richmond, Virginia, was convicted in the Hustings Court of Richmond of possessing and exhibiting lewd and obscene motion pictures in violation of Title 18.1–228 of the Code of Virginia. The Supreme Court of Appeals of Virginia refused a writ of error.

The films in question were admitted in evidence over objection that they had been unconstitutionally seized. The seizure was under the authority of a warrant issued by a justice of the peace on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene.

The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered . . . obscene," was held to be an unconstitutional seizure in *Marcus* v. *Search Warrant*, 367 U. S. 717, 731–732. It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the war-

rant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity," *id.*, at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See *Freedman* v. *Maryland*, 380 U. S. 51, 58–59.

The judgment of the Supreme Court of Appeals of Virginia is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE STEWART base their concurrence in the judgment of reversal upon *Redrup* v. *New York*, 386 U. S. 767.

MR. JUSTICE HARLAN, dissenting.

A police officer filed a sworn affidavit that he had personally witnessed the commission of a crime, to wit, the possession and exhibition of obscene motion pictures. He was granted a warrant to seize the pictures, and did so.

In *Marcus* v. *Search Warrant*, 367 U. S. 717, officers were given a general warrant to seize obscene materials, pursuant to which they selected and seized 11,000 copies of 280 publications most of which were later found non-obscene. With barely a nod to the difference between 11,000 books and magazines selected for seizure by the officers themselves after a warrant had been issued and two obscene movies named in the affidavit, the Court reverses the present conviction on the authority of *Marcus*.

I think that *Marcus* was correctly decided, but I cannot discern its application here. Police officers may not be given *carte blanche* to seize, but they may certainly seize a specifically named item on probable cause, before the work "taken as a whole" has been adjudicated

obscene. Any other rule would make adjudication not merely "not as easily arrange[d]" in the case of movies but quite impossible. If the Court means only that the officer should not merely say that he has seen a movie and considers it obscene, but should offer something in the way of a box score of what transpires therein, I consider it absurd to think that a magistrate, armed with the luminous guidance this Court has afforded, will be thus able to make a better judgment of probable obscenity.

Since the petitioner does not contend that the movies in question here were not obscene, I find it unnecessary to reach the point relied on by my Brothers BLACK, DOUGLAS, and STEWART.